PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

(10)
97-1390

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. Docket Nos. CR92-1467, 1664-1668

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

170

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Paul F. Sheridan
Judge

FILED: March 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770
(CA-96-745-R)

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs - Appellants,

versus

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; RICHARD CULLEN, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Honorable, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; EDWARD A. FLYNN, Chief of Police of Arlington County,

Defendants - Appellees.

UNION INTERNATIONALE DES AVOCATS; UNITED STATES OF AMERICA; FREDERICK M. ABBOTT; DAVID J. BEDERMAN; RICHARD B. BILDER; DAVID D. CARON; ANTHONY D'AMATO; LORI FISLER DAMROSCH; WILLIAM DODGE; MARTHA A. FIELD; JOAN M.

Ex 2

FITZPATRICK; EGON GUTTMAN; LOUIS HENKIN; HAROLD HONGJU KOH; BURT LOCKWOOD; STEFAN A. RIESENFELD; OSCAR SCHACHTER; HERMAN SCHWARTZ; ANNE-MARIE SLAUGHTER; RALPH GUSTAV STEINHARDT; DAVID WEISSBRODT,

Amici Curiae.

ORDER

Appellants have filed an application for stay of or injunction against the execution of Angel Breard, the appellant in case No. 96-25, Breard v. Pruett, pending disposition by the United States Supreme Court of their petition for writ of certiorari. Appellees filed a response in opposition to the application.

The Court denies appellants' application for stay of or injunction against execution.

Entered at the direction of Senior Judge Phillips with the concurrence of Judge Widener and Judge Murnaghan.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY, et al.,

Appellants

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, et al.,

Appellees

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO STAY ANGEL BREARD'S EXECUTION

If there ever were any doubt that Paraguay's federal lawsuit always has been nothing more than a thinly-veiled attempt to thwart Angel Breard's death sentence, Paraguay's present motion to stay Breard's execution certainly removed it. This Court should deny the motion for the following reasons:

1. On January 22, 1998, this Court affirmed the district court's dismissal of Paraguay's lawsuit for lack of jurisdiction. Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998). Paraguay did not seek rehearing in banc or ask this Court to stay its mandate. The mandate issued on February 13, 1998.

Ex 3

2. On February 24, 1998, Paraguay filed a petition for a writ of certiorari in the Supreme Court.[1] On February 25, 1998, the state trial court scheduled Angel Breard's execution for April 14, 1998. Paraguay could have filed its stay request in this Court at any time after February 25 when the state trial court scheduled Breard's execution for April 14. Instead, Paraguay waited a full month and did not file its stay request until March 24.

3. Whether Breard is entitled to a stay of execution is an issue that this Court undoubtedly will address in the context of the stay motion he now has pending in this Court. The answer to that question, however, must depend on the merits of ***Breard's*** case, ***not Paraguay's*** civil suit. Paraguay and its officials clearly have no standing to seek or obtain a stay of Bread's execution. Under 28 U.S.C. § 2101(f), this Court has the authority to stay a "judgment or decree" that is subject to review by petition for certiorari. But, while Paraguay and its officials certainly were parties to this Court's judgment in Paraguay's civil case, staying the judgment in that case cannot possibly operate to stay Breard's execution. And, indeed, Paraguay has not asked this Court to stay its judgment in the civil case.

4. What Paraguay has done instead is to ask this Court to stay Breard's April 14 execution date. Paraguay and its officials, however, are not, and never have been, parties to the case that resulted in the presumptively valid state court criminal judgment against Breard that they now seek to stay. This Court's sole authority to stay Breard's execution is pursuant to 28

[1] Breard filed his certiorari petition on March 11, 1998. The Commonwealth filed its brief in opposition on March 19. Breard filed his stay motion in this Court on March 23, and the Commonwealth filed its opposition on March 24. This Court has not yet acted upon the motion. There is absolutely no question that the Supreme Court can and will dispose of Breard's certiorari petition, as well as his inevitable stay request, prior to the scheduled time of execution.

U.S.C. § 2251,[2] and Paraguay clearly has no standing under that statute to seek such a stay because neither it nor its officials are a party to Breard's ongoing § 2254 proceeding.

5. In Breard's federal habeas case, both this Court and the district court correctly have ruled that his "Vienna Convention" claim is barred by his procedural default in failing ever to have raised the claim in state court. See Breard v. Pruett, 134 F.3d 615, 619-620 (4th Cir. 1998), affirming, Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996); see generally Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996) (claims never raised in state court are barred from federal habeas review).[3] It thus is obvious that Paraguay is attempting to obtain a stay of execution for Breard because his underlying habeas claim is barred and, as a matter of law, cannot support the granting of a stay. This Court clearly cannot permit Paraguay to obtain for Breard what he cannot obtain in his own right.

6. In Gomez v. United States District Court, 503 U.S. 653 (1992), the Supreme Court made clear that a suit under 42 U.S.C. § 1983 cannot be employed to obtain a stay of execution that would be precluded under the rules governing successive federal habeas petitions. See Lonchar v. Thomas, 116 S.Ct. 1293, 1301 (1996) (interpreting Gomez to mean that the habeas rules "would apply, even if § 1983 [was] also a proper vehicle [for the] claim"); Felker v. Turpin, 101 F.3d 95, 96 (11th Cir.) ("Gomez held that a plaintiff cannot escape the rules regarding

[2] "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may...stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.

[3] Even if Breard's "Vienna Convention" claim were not procedurally defaulted, a federal habeas court could not grant relief upon such a claim without violating the "new rule" doctrine. See generally Caspari v. Bohlen, 510 U.S. 383, 390 (1994). No court ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a State prisoner's conviction or sentence. If such a rule ever is created, it must be announced on direct appeal, not federal collateral review.

second or successive habeas petitions by simply filing a § 1983 claim"), cert. denied, 117 S.Ct. 451 (1996). Regardless of whether such a § 1983 suit is filed by the prisoner himself or by a third party, ***if the object of the suit is to obtain for the prisoner relief from his conviction or sentence to which he would not be entitled in a federal habeas proceeding, Gomez dictates that the attempted circumvention must fail.***

7. On numerous occasions during just the last year, the Supreme Court has denied stays of execution premised upon ongoing § 1983 litigation designed to evade the rules governing federal habeas review under § 2254. See, e.g., Buchanan v. Gilmore, 118 S.Ct. ____, 1998 U.S. LEXIS 1782 (Mar. 18, 1998); Tucker v. Texas, 118 S.Ct. 906 (1998); In re Mu'Min, 118 S.Ct. 438 (1997) (in addition to denying stay, Court also denied "petition for writ to preserve [§ 1983] jurisdiction"); Perry v. Norris, 118 S.Ct. 15 (1997); O'Dell v. Allen, 118 S.Ct. 2 (1997) (denial of injunction); In re O'Dell, 118 S.Ct. 2 (1997) (denial of stay); McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). See also Griffin v. Missouri, 515 U.S. 1153 (1995); Poyner v. Murray, 507 U.S. 981 (1993).[4]

8. Even if Paraguay could speak for Breard - and it cannot - it clearly would not be entitled to a stay of Breard's execution under the stringent rules governing federal habeas proceedings. Gomez and its progeny require that this Court deny Paraguay's attempt to circumvent those rules by requesting a stay of Breard's execution, an extraordinary form of federal collateral relief to which neither Breard nor Paraguay is entitled. Indeed, just last week a panel of this Court vacated a stay of execution improvidently granted by a district court on the

[4] In Poyner, the Supreme Court denied a stay of execution and the prisoner was executed as scheduled on March 18, 1993. Significantly, the Court did not dispose of the certiorari petition in the § 1983 proceeding upon which the stay request had been premised until two months later. See Poyner v. Murray, 508 U.S. 931 (1993).

basis of a § 1983 suit filed by a death row prisoner. See Buchanan v. Gilmore, ___ F.3d ___, 1998 U.S. App. LEXIS 5058 (4th Cir., Mar. 18, 1998) (Judges Ervin, Hall and Butzner). The Supreme Court subsequently denied the prisoner's stay request and he was executed as scheduled. See Buchanan, 1998 U.S. LEXIS 1782. Obviously, if a State prisoner himself cannot obtain a stay of execution on the basis of a § 1983 suit he has filed, a third-party § 1983 suit such as Paraguay's cannot support such a stay.

9. Moreover, even if Paraguay could overcome all of the foregoing obstacles to the granting of a stay, this Court still should deny Paraguay's request to stay Breard's execution. Under Barefoot v. Estelle, 463 U.S. 880, 895 (1983), this Court may not stay a State prisoner's execution unless there is a reasonable probability that four Justices would vote to grant certiorari ***in his case***, and there is a significant possibility the Court would reverse the decision of the court of appeals. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995). Paraguay cannot possibly meet this stringent standard.

10. First of all, Paraguay filed its certiorari petition in the Supreme Court more than a month ago. Thus, even if the impropriety of a third-party request to stay Breard's execution were dropped from the equation, it is self-evident that the Supreme Court is far better situated than this Court to determine whether it needs more time to consider a certiorari petition that was filed weeks ago.

11. Moreover, as demonstrated in the Warden's opposition to Breard's stay request (Attachment), there is ***no*** likelihood the Supreme Court will grant Breard's certiorari petition or reverse this Court's decision denying him federal habeas relief. But, even if the granting of a stay of Breard's execution could be made to turn on the likelihood the Court will grant ***Paraguay's*** certiorari petition, the result would be the same. The specific issue raised in Paraguay's certiorari

petition is whether the federal courts have jurisdiction to entertain a civil suit brought by a foreign country and its officials against the officials of a State, ***where the sole object of the suit is the invalidation of a state prisoner's criminal conviction and sentence***. On that issue, the only two federal appeals courts that have considered the matter have concurred that the question must be answered in the negative. See Paraguay, 134 F.3d at 627-629; United Mexican States v. Woods, 126 F.3d 1220, 1222-1224 (9th Cir. 1997). The Supreme Court, of course, grants certiorari "only for compelling reasons." U.S.Sup.Ct. Rule 10. Primary among such "compelling reasons" is the existence of a "conflict" between the decision of a court of appeals in the case where review is being sought and "the decision of another...court of appeals on the same important matter." Rule 10(a). Given the lack of conflict among the courts of appeals, there is no reasonable probability that the Supreme Court will grant certiorari in Paraguay's case. Paraguay's pending certiorari petition, therefore, could not furnish the basis for a stay of Breard's execution even if Paraguay could overcome its clear lack of standing to request such relief.

12. There also is no significant possibility that the Supreme Court would reverse this Court's decision. The Eleventh Amendment clearly does not permit a foreign nation to sue a State in federal court. See Principality of Monaco v. Mississippi, 292 U.S. 318 (1934). A suit, the primary purpose of which is the setting aside of a State prisoner's criminal conviction or sentence is, in reality, a suit against the State, see Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2034 (1997) (Eleventh Amendment bars suit against state officials when State is the real, substantial party in interest), and the State's interests are at their apex when the validity of its criminal judgments are challenged collaterally in federal court. See generally McCleskey v. Zant, 499 U.S. 467, 491-492 (1991). Moreover, the statutory habeas corpus remedy embodied in § 2254 proceedings is "well established" as the ***sole*** relevant exception to the State's Eleventh Amendment immunity. See

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1182 (1996) (Souter, J., dissenting); Paraguay, 134 F.3d at 627-628 n.6. Therefore, outside the limited context of federal collateral proceedings initiated by a State prisoner, the federal courts have no jurisdiction to entertain a suit, like Paraguay's, where the *sine qua non* is the overturning of the prisoner's capital murder conviction and death sentence. See Paraguay, 134 F.3d at 627-629; Woods, 126 F.3d at 1222-1224.

13. Even if this Court were wrong about the Eleventh Amendment, there ***still*** would be no significant possibility of reversal in this case. As the district court found, see Paraguay, 949 F. Supp. at 1273, the lower federal courts simply have no jurisdiction to conduct what is, in effect, a direct review of the State court criminal judgment against Breard. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923). Moreover, as both the Commonwealth ***and the United States*** argued in this Court,[5] the issues raised by Paraguay about alleged treaty violations and the remedies therefor, are essentially non-justiciable "political questions" which are beyond the jurisdiction of the federal courts. See generally Baker v. Carr, 369 U.S. 186, 211 (1962); see also Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations...[but] with all this the judicial courts have nothing to

[5] The United States filed an amicus brief in this Court supporting the Commonwealth's position that the federal courts lack jurisdiction to entertain Paraguay's suit. The United States also presented its position during oral argument on June 4, 1997. Finally, the United States communicated its position to Paraguay in a letter from the Department of State to the Ambassador of Paraguay dated July 7, 1997. (Attachment 2). This Court, therefore, should not be misled by Paraguay's suggestion that this Court's decision "is inconsistent with" the position of the United States. (Paraguay's Stay Memorandum at 8).

do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department"). Because there is no significant possibility that the Supreme Court would reverse this Court's conclusion that the federal courts lack jurisdiction to entertain Paraguay's suit, the pending certiorari petition cannot conceivably serve as the basis for a stay of Breard's execution.[6]

CONCLUSION

Paraguay's motion for a stay of Angel Breard's execution should be denied.

Respectfully submitted,

JAMES S. GILMORE, III, GOVERNOR
OF VIRGINIA, et al.

By: _____
Donald R. Curry
Senior Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

By: _____
Ara L. Tramblian
Deputy County Attorney

[6] Under Barefoot, in addition to the "substantial probability" and "significant possibility" requirements, the party seeking a stay of execution also must demonstrate a "likelihood of irreparable harm." See Barefoot, 463 U.S. at 895. When the movant is a death row prisoner himself, this requirement usually is deemed satisfied. Paraguay, however, simply cannot demonstrate any likelihood of "irreparable harm" to itself or to its officials if Breard is executed while its certiorari petition remains pending, ***especially if Breard himself has asked for and been denied a stay***.

Office of the County Attorney
#1 Courthouse Plaza, Suite 403
2100 Claredon Boulevard
Arlington, Virginia 22201

CERTIFICATE OF SERVICE

On March 25, 1998, a copy of this Opposition was mailed and faxed to Donald F. Donovan, Debevoise & Plimpton, 875 Third Avenue, New York, NY 10022, counsel for appellants.

_____
Donald R. Curry
Senior Assistant Attorney General

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL FRANCISCO BREARD,

Appellant

v. **No. 96-25**

FRED W. GREENE, WARDEN,

Appellee

WARDEN'S OPPOSITION TO
MOTION FOR STAY OF EXECUTION

The Warden, by counsel, opposes Angel Breard's motion for a stay of execution:

1. In a published opinion dated January 22, 1998, this Court affirmed the denial of federal habeas corpus relief in Breard's case. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). The Court denied Breard's petition for rehearing on February 18, 1998.

2. On February 25, 1998, pursuant to Virginia Code § 53.1-253.1, the state trial court scheduled Breard's execution for April 14, 1998. On February 26, 1998, this Court issued its mandate.[1]

3. Breard now asks this Court to issue a stay of execution so that the Supreme Court will have adequate time to consider a petition for a writ of certiorari which he filed on March 11, 1998. Well-settled principles require that this request be denied.

[1] Technically, this Court has no jurisdiction to issue a stay of execution because the mandate already has issued. Breard also has requested that this Court recall the mandate. Both the stay motion and the request to recall the mandate should be denied.

ATTACHMENT 1

4. Both the Supreme Court and this Court have made clear that a prisoner under sentence of death is not automatically entitled to a stay of execution for purposes of filing a petition for a writ of certiorari. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995); Autry v. Estelle, 464 U.S. 1, 2-3 (1983); Beaver v. Netherland, 101 F.3d 997 (4th Cir. 1996). Quite clearly, moreover, the Supreme Court is in the best position to determine whether a stay of execution is necessary for it to have sufficient time to rule upon the petition Breard already has filed. Indeed, the Supreme Court has not hesitated to grant a stay when necessary or to deny a stay when unnecessary. See, e.g., Buchanan v. Angelone, 117 S. Ct. 1423 (1997) (stay granted); Mu'Min v. Pruett, 118 S.Ct. 438 (1997) (stay denied). As this Court is well aware, the three full weeks remaining before Breard's April 14 execution date is more than enough time for the Supreme Court to dispose of the certiorari petition that Breard filed two weeks ago.[2]

5. In any event, Breard must satisfy the test established in Barefoot v. Estelle, 463 U.S. 880 (1983), in order for this Court to stay his execution. Specifically, Breard is entitled to a stay only if he can establish that there is "a reasonable probability that four members of the [Supreme] Court would consider the underlying issues sufficiently meritorious for the grant of certiorari" ***and*** that there is "a significant possibility of reversal of [this] Court's decision [by the Supreme Court]" if certiorari were granted. See Tuggle, 116 S. Ct. at 5. Breard clearly has not satisfied these demanding requirements.

6. In his certiorari petition, Breard has raised his so-called "Vienna Convention" claim. This Court correctly ruled that the claim is procedurally barred because it is undisputed that Breard never raised the claim in state court and because he had failed to show the required "cause" for the

[2] The respondent filed his brief in opposition to Breard's petition on March 19.

default. Breard, 134 F.3d at 619-620. It thus would be difficult to imagine a claim with *less* chance of the Supreme Court's granting certiorari and reversing this Court's decision.

7. The recent actions of the Supreme Court in cases from Virginia and Texas demonstrate that there is no substantial likelihood the Court will grant certiorari to review defaulted "Vienna Convention" claims such as Breard's. In September of 1997, the Supreme Court denied Mario Murphy's certiorari petition and request for a stay of execution in a case where this Court had ruled, just as it has in Breard's case, that a "Vienna Convention" claim never raised in state court is barred from federal habeas review. See Murphy v. Netherland, 116 F.3d 97 (4th Cir.), stay and cert. denied, 118 S.Ct. 26 (1997). Murphy was executed as scheduled on September 17, 1997. Similarly, in June of 1997, the Supreme Court denied a stay request and a petition for a writ of habeas corpus in a capital case from Texas where the prisoner was raising a defaulted "Vienna Convention" claim. See In Re Irineo Tristan Montoya, 117 S.Ct. 2476 (1997). Montoya was executed as scheduled on June 18, 1997.[3]

8. Breard also has raised his "proportionality review" claim in his certiorari petition. This Court correctly ruled that the claim is defaulted because it was raised on direct appeal solely as a matter of state law and because, when it first was raised as a federal "due process" claim during the state habeas proceedings, the Virginia Supreme Court expressly applied its procedural default rule. See Breard, 134 F.3d at 621.[4]

[3] In both Murphy and Montoya, the prisoners' petitions filed in the Supreme Court squarely raised the alleged "Vienna Convention" violations. (See Attachments A and B). Indeed, the "Questions Presented" in Murphy's certiorari petition are virtually identical to Breard's. (Attachment A).

[4] Even if the claim were not defaulted, moreover, it fails to raise a cognizable federal issue. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (errors of state law not cognizable); George v. Angelone, 100 F.3d 353, 360 (4th Cir. 1996) (Virginia Supreme Court is final arbiter of scope of state appellate review), cert. denied, 117 S.Ct. 854 (1997).

9. As a matter of law, claims that are barred from federal collateral review by established principles of procedural default cannot provide a basis for the granting of a stay under the Barefoot standard. See Bowersox v. Williams, 116 S.Ct. 1312 (1996); Delo v. Stokes, 495 U.S. 320 (1990); see also McCleskey v. Zant, 499 U.S. 467, 490 (1991) (equating principles of procedural default and abuse of writ). There is no reasonable probability that the Supreme Court will grant certiorari to review this Court's fact-specific application of the procedural default doctrine or its determination that Breard has not shown "cause" for his defaults.

10. For the foregoing reasons, this Court should deny Breard's motion for a stay of execution.

Respectfully submitted,

FRED W. GREENE, WARDEN

By: _____
Counsel

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

CERTIFICATE OF SERVICE

On March 24, 1998, a copy of the foregoing Opposition was mailed and faxed to Alexander Slaughter, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030, counsel for appellant.

Donald R. Curry
Senior Assistant Attorney General

United States Department of State

Washington, D.C. 20520

JUL - 7 1997

Dear Ambassador Prieto:

I am responding on behalf of the Department of State to your letter to Ambassador Davidow of June 3, 1997, concerning the matter of Mr. Angel Breard. Your letter was received at the same time that my letter to you of the same date concerning this case was delivered to your representatives. Your letter reiterates your government's earlier request that the United States intercede on behalf of Mr. Breard. It also again expresses the view that the courts of the United States have authority to remedy any violation of the obligation of consular notification that occurred with respect to his detention and discusses the alternative possibility of these matters being considered by the International Court of Justice.

We have previously assured your government that the United States places the highest value on ensuring respect for the consular notification obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). We deeply regret if such notification was not provided to Mr. Breard. After learning that Mr. Breard may not have been advised of his right to consular assistance, the Department reminded officials of the State of Virginia of the need to advise all alien detainees of this right. We have now had extensive discussions with such officials about how consular notification and access should be implemented.

Since receiving your June 3 letter, the Department has also reviewed in more detail the facts of Mr. Breard's case, with a particular focus on the consular notification issues raised by your government and the claim that a consular officer could have dissuaded Mr. Breard from believing that that he should confess in open court to the February 17, 1992, murder of Ruth Dickie and claim to have been under a "Satanic curse" imposed by his father-in-law. Attached for your information is a summary of the facts as we understand them. (If there is additional information that you believe we have not considered, we would be pleased to receive it.)

Our review has been informed by our understanding of the consular notification obligation. A primary purpose of consular notification is to permit a state to offer its nationals in a foreign country the benefit of consular services and protection. The actual extent of consular assistance will depend on the country concerned, its consular practices, and its resources in the host country. Under no circumstances, however, can a consular officer in the United States act as an attorney for an alien. Moreover, when an alien is arrested, he is subject to the laws of the host state, and consular protection cannot immunize him from those laws, the judicial system established to enforce them, or the penalties imposed for their violation. A consular officer instead generally seeks to ensure that the alien has appropriate legal representation and that his legal rights are respected. The consular officer may also attend to the alien's needs while imprisoned, and may communicate with the alien's family and friends, if necessary. The actual need for and provision of consular services will generally be less in

The Honorable
Jorge G. Prieto,
Ambassador of Paraguay,
Washington.

ATTACHMENT 2

situations where an alien is well represented by attorneys and in direct touch with family and friends – a situation most likely when the alien has been residing in the host country for a significant period. In some cases, an alien may decline consular notification, for privacy or other reasons, or because the alien does not consider consular assistance to be necessary.

While the obligation of consular notification is a serious one, in every country there are times when it is overlooked. U.S. diplomatic and consular officers raise issues of lack of consular notification with respect to U.S. nationals abroad, just as other countries' representatives raise similar concerns with the Department of State about aliens in the United States. Consular notification and access is a matter of continuous discussion between governments, which in our experience regularly review and if necessary enhance their efforts at compliance. Neither the VCCR text nor its negotiating record addresses how a failure to comply with the consular notification obligation must be remedied. We are aware of no state party to the VCCR that has a procedure for setting aside the results of its judicial process when there has been a failure to provide consular notification.

Having reviewed the facts in light of these considerations, we cannot accept that the lack of consular notification provides a basis for undoing Mr. Breard's conviction and sentence. It is entirely speculative, in any event, that a Paraguayan consul would have been intimately involved in Mr. Breard's trial and defense and would have convinced Mr. Breard to accept a plea bargain. Mr. Breard's attorneys were well positioned to advise him of the likely consequences of his confession in the State of Virginia, yet he would not accept their advice or the apparent advice of his mother to plead guilty. It is difficult to believe that a consular officer could have proven more persuasive.

Our review of these issues has reinforced our view that lawsuits between governments are not the appropriate means to enforce the consular notification obligation. We agree in particular with your assessment that this case is not one appropriate for resolution by the International Court of Justice. The reference to the VCCR Optional Protocol in our amicus brief was simply to illustrate that the state parties to the VCCR contemplated that issues under the VCCR would be addressed on a government-to-government basis, and certainly not by a government resorting to the domestic courts of another state party. We regret if that reference created any misunderstanding on this point. In any event, however, an ICJ proceeding is both costly and takes many years and extensive resources to pursue. It seems particularly inappropriate when there is no genuine dispute as to the requirements of consular notification and when the suggestion that consular notification in a particular case would have led to a different result is so speculative and implausible. Moreover, the ICJ would not have jurisdiction over Paraguay's asserted claims under the 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, which is not relevant to these issues in any event.

In closing, I reiterate that the Department of State remains available to consider other relevant information, including information about Mr. Breard's case and about consular notification practice by Paraguay and other countries. In addition, we would welcome the opportunity to discuss with Paraguayan consular officers the general question of consular notification and access and how our respective countries can improve implementation of this obligation.

Sincerely,

James H. Thessin
Deputy Legal Adviser

FACTS CONCERNING ANGEL BREARD

Mr. Breard is a dual Paraguayan-Argentinian national who came to the United States in 1986, originally as a student. He had been in the United States for roughly six years at the time he was arrested for Ruth Dickie's murder. He studied English when he first arrived here, and his command of English was sufficiently good that he acted as an interpreter in prison and did not require the assistance of an interpreter at trial. His trial attorneys have stated that they had no difficulty in communicating with him.

The State of Virginia cannot document that consular notification was given, but it is clear that Mr. Breard's family was quickly notified of his arrest and that others in Paraguay were also contacted. When he was first arrested, Mr. Breard asserted his right to an attorney and called his uncle. His mother testified on his behalf in the sentencing phase. In addition, Mr. Breard's attorneys have said that they were in touch with sources in Paraguay for information that might have assisted with his defense.

Mr. Breard's attorneys have also stated that they and his mother advised him to plead guilty. They have further stated that they advised Mr. Breard that his chances of being sentenced to death, rather than to life imprisonment, would be greater if he insisted on a trial and testified. As far as the courts have determined to date, Mr. Breard's attorneys were competent and he had the full panoply of due process protections guaranteed by the Constitution of the United States. These protections are among the most extensive provided by any state party to the VCCR.

Mr. Breard rejected the advice of his attorneys, refused to pursue a possible plea arrangement, and insisted on testifying at trial and at his sentencing hearing. The court was informed that Mr. Breard was testifying against the advice of counsel. He testified to the facts of the crime and claimed to have acted under a "Satanic curse" imposed by his father-in-law. During the sentencing phase, his testimony led to cross-examination that his trial attorneys have said had a negative effect on the jury.

Independently of Mr. Breard's testimony there was physical evidence that Mr. Breard attempted to rape and then brutally murdered Ruth Dickie on February 17, 1992. Blood, semen, and hair samples and DNA tests all pointed to Mr. Breard as the murderer. There was also evidence of significant aggravating factors to support imposition of the death penalty under Virginia law. The scene of the crime reflected the violence of Ruth Dickie's murder and the attempted rape that preceded it. Mr. Breard had attacked two other women, one before and one after Ruth Dickie's murder. Each attack was violent, and the second involved a sexual assault that was interrupted only because a neighbor called the police, who caught Mr. Breard with his victim. The arrest of Mr. Breard in the course of this assault led to Mr. Breard being charged with Ruth Dickie's murder.

It appears from these facts that Mr. Breard received the assistance that consular notification is designed to ensure. He had two attorneys and was in close touch with his family and others who might have helped him. Mr. Breard was a six-year U.S. resident who asked for an attorney when arrested; he apparently understood at least this basic tenet of the U.S. system reasonably well. In any event, however, he was clearly and repeatedly informed that it would not be to his benefit to plead not guilty and then to confess at trial.

COMMONWEALTH of VIRGINIA

Richard Cullen
Attorney General

Office of the Attorney General
Richmond 23219

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

CRIMINAL LITIGATION SECTION
CAPITAL LITIGATION UNIT

TELEPHONE: (804) 786-4624
FAX: (804) 786-0142

FACSIMILE COVERSHEET

DATE: MAR. 25, 1998

TO: DONALD DONOVAN / DEBEVOISE & PLIMPTON

FROM: **Donald R. Curry, Senior Assistant Attorney General**

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSÉ ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs-Appellants,

— against —

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia, *(additional parties listed inside cover)*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

PLAINTIFFS-APPELLANTS' BRIEF

Donald Francis Donovan
Barton Legum
Michael M. Ostrove
Alexander A. Yanos
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
(212) 909-6000

Loren Kieve
DEBEVOISE & PLIMPTON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-8070
Attorneys for Plaintiffs-Appellants
(additional counsel listed inside cover)

Dated: March 4, 1997

Additional Parties:

JAMES S. GILMORE III, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; J.D. NETHERLAND, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; and ROBERT A. DREISCHER, Acting Chief of Police for the County of Arlington,

Defendants-Appellees.

Additional Counsel:

Professor Rodney A. Smolla
Professor Linda A. Malone
College of William and Mary
Marshall-Wythe School of Law
South Henry Street
P.O. Box 8795
Williamsburg, Virginia 23187
(804) 221-3800

Associate Professor Leslie M. Kelleher
T.C. Williams School of Law
University of Richmond
Richmond, Virginia 23173
(804) 289-8359

Attorneys for Plaintiffs-Appellants

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Rule 26.1, plaintiffs-appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

No.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

No.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

No.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an action for injunctive and declaratory relief to remedy violations of two treaties of the United States and of 42 U.S.C. § 1983. The District Court therefore had original jurisdiction under 28 U.S.C. § 1331. In addition, this is an action in which a foreign state is the plaintiff and citizens of a state are defendants. The District Court therefore also had jurisdiction under 28 U.S.C. § 1332(a)(4). While the United States Supreme Court also had original jurisdiction of this action, *see* U.S. CONST. art. III, § 2, that Court's jurisdiction over this case is not exclusive. 28 U.S.C. § 1251(b)(1).

On November 27, 1996, the District Court entered a final order of dismissal that disposed of all claims of all parties in the action. Plaintiffs-appellants filed their notice of appeal on December 5, 1996. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erroneously held that, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment bars an action seeking prospective injunctive relief against state officials to end the continuing harm the plaintiffs suffer as a result of defendants' failure to afford them their rights under two treaties of the United States, on the ground that the injunction would merely remedy past unlawful conduct, not end a continuing violation of federal law?

2. Whether the District Court erroneously held that, under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), it lacked subject matter jurisdiction over an action seeking vacatur of a foreign national's criminal conviction and sentence brought by the national's sovereign, its ambassador and its consul even though the plaintiffs here had not been parties to the state criminal proceedings and sought to vindicate only their own rights under two treaties of the United States?

STATEMENT OF THE CASE

This is an action by plaintiffs-appellants the Republic of Paraguay, its Ambassador Jorge J. Prieto and its Consul General José Antonio Dos Santos (collectively, "Paraguay") to enforce the rights granted Paraguay and its consular officers under two treaties of the United States, the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"), and the Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") (together, the "Treaties"). The Treaties provide Paraguay's consular officers with the rights (*1*) to receive prompt notification of the detention of Angel Francisco Breard, a Paraguayan national, and (*2*) to provide consular assistance to Breard during the course of the criminal proceedings against him. No notification was provided, and Paraguay's consular officers were allowed access to Breard only after he was tried, convicted and sentenced to death and had exhausted all appeals and state habeas proceedings. Defendants are Virginia state officials who continue to deny Paraguay its right to provide consular assistance to Breard at a time and in a context where it can be meaningful and effective.

On September 12, 1996, Paraguay filed its complaint in the United States District Court for the Eastern District of Virginia, alleging violations of the two Treaties and, with respect to plaintiff-appellant Dos Santos, violations of 42 U.S.C. § 1983. The complaint sought, among other relief, an injunction barring the defendants from taking any future actions based on Breard's illegally obtained conviction, vacating the conviction and ordering the defendants to afford Paraguay its rights under the Treaties in any further proceedings against Breard. On October 1, 1996, defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(1), 12(b)(6).

On November 27, 1996, the District Court (Hon. Richard L. Williams) entered a final order dismissing the action for lack of subject matter jurisdiction. The plaintiffs filed their notice of appeal on December 5, 1996.

STATEMENT OF FACTS

The Treaty Obligations

In 1970, the United States and the Republic of Paraguay entered into the Vienna Convention. In doing so, both nations recognized that each sovereign was bound by the terms of the Convention and that each had the right to have any violation of those terms by the other remedied. A12-13.[1]

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1. Citations in the form "A__" are to the accompanying Joint (continued...)

Under the United States Constitution, the Vienna Convention became part of the "supreme Law of the Land" and binding on each of the United States. A12; U.S. CONST. art. VI.

A key consular function protected by the Vienna Convention is assisting nationals of one nation who are arrested by the law enforcement authorities of the other. A13-14. Law enforcement officials in the United States arresting a Paraguayan national must "without delay" inform the Paraguayan that he has the right to communicate with a Paraguayan consular officer. If the Paraguayan so requests, the law enforcement officials must "without delay" inform the Paraguayan consular officers of the arrest and permit them to communicate with the Paraguayan to render assistance to him in the criminal proceedings. *Id.* The Vienna Convention makes it clear that consular officers must be provided a *meaningful* opportunity to exercise their right of consular communication. Vienna Convention, art. 36(2) (right of consular communication "shall be exercised in conformity" with local laws and regulations, provided that such "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended").

Over 130 years ago, in 1860, the United States and the Republic of Paraguay entered into the Friendship Treaty. A14-15. Article XII requires that consular officers of Paraguay be accorded "whatever privileges, exemptions, and immunities are or may be" granted by the United States to consular officers

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1.(...continued)
Appendix. Except as otherwise noted, the statement of facts is based on the allegations of the complaint (A6-26).

"of any other nation whatever." The United States subsequently granted to consular officers of other nations, including the United Kingdom and the Russian Federation, the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals by law enforcement authorities in the United States. A15. Under the Friendship Treaty, law enforcement authorities in the United States are therefore required to extend Paraguayan consular officers the same privilege and immediately notify them when a Paraguayan citizen is arrested. *Id.*

Defendants' Continuing
Violation Of Paraguay's Rights

On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested by the Arlington County police department on suspicion of murder. A17. Although they were aware that Breard was a Paraguayan national, defendants never informed Breard of his right under the Vienna Convention to consular assistance from Paraguay. Nor did they inform Paraguay that Breard was in their custody. *Id.* Had defendants done so, Breard would have invoked his right to the assistance of his country's consul, and Paraguay would have provided him help in his criminal proceeding that could have changed its outcome, including (*a*) evaluating the desirability of Virginia's plea offer of life imprisonment, (*b*) assessing the advice of Breard's counsel that he not testify at trial and (*c*) presenting material evidence in support of a life sentence at the mitigation phase of Breard's trial. A17-20.

On June 24, 1993, Breard was convicted of murder. A20. On August 22, 1993, the state court imposed a sentence of death. *Id.* Breard's direct appeals of the conviction and

sentence were denied, as was his state petition for habeas corpus. *Id.* It is undisputed that defendants did not begin to permit Paraguay to render consular assistance to Breard until after his direct appeals and state habeas proceedings were exhausted. *E.g.*, A17, A87.

Defendants' failure to advise Breard of his rights, to advise Paraguay of Breard's detention and to afford Paraguay a meaningful opportunity to provide consular assistance to Breard violated both the Vienna Convention and the Friendship Treaty. A7-8, A21-23. These violations caused injury both to the Republic of Paraguay's sovereign interest in protecting the life and liberty of its citizens abroad through its consular officers and to the interests of plaintiffs Prieto and Dos Santos in effectively performing their consular functions. A9, A13, A21-24. Defendants' ongoing failure to provide Paraguay with a meaningful opportunity to exercise its consular communication rights continues to violate the Treaties. A7-8.

The District Court's Decision

In its memorandum opinion, the District Court held that, as a party to the Treaties, Paraguay had standing to sue for redress under the Treaties and that the court had the power to interpret treaties and fashion an equitable remedy for their violation. A119 (opinion to be published at 949 F. Supp. 1269). The court determined that Consul General Dos Santos is a person within the jurisdiction of the United States and therefore a proper plaintiff under section 1983. A121. The court also concluded that, absent any jurisdictional limitations, the case was suitable for declaratory relief. *Id.*

For purposes of deciding the motion, the District Court assumed that the defendants had violated federal law and Breard's death sentence resulted from these violations. A117. The court expressed its "disenchant[ment]" with defendants' violation of the Treaties and pointed to evidence that "the Commonwealth [of Virginia] has disregarded the Vienna Convention on at least one other occasion." A117-18, A121 n.1.

The District Court nevertheless dismissed Paraguay's suit, holding that Paraguay had failed to allege the "ongoing violation" of federal law required to remove the bar of the Eleventh Amendment and to bring the case within the doctrine of *Ex parte Young*. According to the District Court, "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." A117. The District Court reasoned:

> Plaintiffs urge that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today. Assuming the validity of this assertion, it is a tragic consequence of Virginia's failure to abide by the law. Nonetheless, it is still a *consequence* of the violation and not a continuing wrong.

Id. (emphasis in original). In other words, the District Court ruled that, even though the defendants are preparing to put Breard to death without ever providing Paraguay a meaningful opportunity to afford him the assistance it has a federally guaranteed right to provide, the court was powerless to grant relief.

The District Court also ruled that it lacked subject matter jurisdiction under the *Rooker/Feldman* doctrine, which holds that the district courts have no jurisdiction to review state court judgments on federal questions that are subject to ultimate review in the Supreme Court. A118 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983)). The District Court acknowledged that it was the first forum in which Paraguay had sought relief, that Paraguay sought to vindicate its own rights rather than those of Breard, that the case before it was not an appeal and that Paraguay did not ask it to review trial defects. *Id.* The court nonetheless held that it "ha[d] no authority to disturb a state court ruling regardless of the procedural posture of the litigants," because "that power rests solely with the Supreme Court of the United States." *Id.*

SUMMARY OF ARGUMENT

The District Court wrongly construed the Eleventh Amendment to bar Paraguay's claims. Even if the District Court were correct that defendants' violation of Paraguay's rights has ceased, established precedent holds *Ex parte Young* to authorize suits against state officials for injunctive relief remedying the continuing effects of past violations of federal law, so long as the suit does not seek retroactive damages. Paraguay seeks no money damages. It asks for an injunction directing defendants to eliminate the effects of their abiding refusal to afford Paraguay its substantive rights under the Treaties. Paraguay's suit comes squarely within the tenets of *Ex parte Young*.

In any event, the District Court's conclusion that the defendants had cured their treaty violations is in error. Rather than fulfilling their obligation to provide prompt notice and enable meaningful consular assistance, defendants allowed Paraguay access to Breard only when it was guaranteed to be futile—long after he had been tried, convicted and sentenced to death and had exhausted all appeals and state habeas proceedings. The Treaties secure Paraguay's right to a meaningful opportunity to assist its detained nationals during criminal proceedings. The defendants have never provided Paraguay that opportunity.

The District Court also wrongly decided that the *Rooker/Feldman* doctrine barred Paraguay's suit because the complaint impermissibly sought review of the merits of a final state judgment. The district courts have jurisdiction of actions on treaties of the United States, including actions by foreign states as plaintiffs, and may enjoin enforcement of a state court judgment rendered in violation of federal law. Paraguay was not a party to the state proceedings against Breard, had no possibility of appeal from the state court decisions and had no opportunity to litigate its claims prior to instituting this action. *Rooker/Feldman* therefore does not bar its claims.

ARGUMENT

Standard of Review

"A district court order dismissing a case on the grounds that the undisputed facts establish a lack of subject matter jurisdiction is a legal determination subject to *de novo* appellate review." *Richmond, F.&P. R.R. v. United States*, 945 F.2d 765, 768-69 (4th Cir. 1991) (citation omitted), *cert. denied*,

503 U.S. 984 (1992); *accord White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995); *see also Harter v. Vernon*, 101 F.3d 334, 336-37 (4th Cir. 1996) (questions of applicability of Eleventh Amendment reviewed *de novo*).

Where, as here, no evidence was offered on a Rule 12(b)(1) motion to controvert the complaint's allegations, the Court must assume the truth of the allegations and consider the complaint in the light most favorable to the plaintiff. *White*, 53 F.3d at 44; *see also Dickey v. Greene*, 729 F.2d 957, 958-59 (4th Cir. 1984) (en banc).

I.

BECAUSE IT SEEKS ONLY TO PROSPECTIVELY COMPEL DEFENDANTS TO END THE CONTINUING HARM RESULTING FROM THEIR VIOLATION OF FEDERAL LAW, PARAGUAY'S SUIT IS NOT BARRED BY SOVEREIGN IMMUNITY.

A. Paraguay Seeks Injunctive Relief Against Consequences Of Past Deprivations Of Federal Rights That Is Authorized By *Ex Parte Young*.

In *Ex parte Young*, the Supreme Court held the Eleventh Amendment's sovereign immunity not to apply to suits against state officials acting in their official capacity, provided that the plaintiff sought only a prospective injunction to force the state officials to comply with federal law. 209 U.S. 123, 159-160 (1908). As the Court explained, where a state official acts in a manner inconsistent with federal law,

"[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*; *accord* U.S. CONST. art. VI, cl. 2.

To come within the *Ex parte Young* doctrine, the plaintiff may seek only prospective injunctive relief, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), against an "ongoing" violation of federal law from which the plaintiff is currently suffering, *Papasan v. Allain*, 478 U.S. 265, 282 (1986); *see Coakley v. Welch*, 877 F.2d 304, 307 & n.2 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989). This requirement ensures that a plaintiff cannot use *Ex parte Young* to perpetrate "a raid on the state treasury for an accrued monetary liability." *Milliken v. Bradley*, 433 U.S. 267, 290 n.22 (1977); *see also Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994) (actions for "prospective injunctive relief only, rather than any form of retroactive compensatory damages" may be brought, consistent with *Ex parte Young*), *cert. denied*, 116 S. Ct. 60 (1995). At the same time, the availability of injunctive relief under *Ex parte Young* is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Papasan*, 478 U.S. at 278 (internal quotation omitted). Thus, as this Court explained in *Coakley v. Welch*:

> few, if any, suits are barred for failure to allege an "ongoing violation" under *Papasan*. Quite logically, the courts treat the issue of whether a violation is "ongoing" as related to the issues of whether prospective relief is appropriate, or whether the requested relief would operate instead as an illegitimate award of retroactive damages.

877 F.2d at 307 n.2 (citations omitted).

Here, Paraguay seeks no money damages. The relief it requests is that defendants take no further actions based on Breard's illegally obtained conviction, that the conviction be vacated and that Paraguay be given the opportunity to participate meaningfully in any further proceedings against him. A25. The relief sought would put a direct end to the continuing harm Paraguay is suffering. This relief accords with both the express terms and the underlying policy of the *Ex parte Young* doctrine.

Notwithstanding these principles, the District Court held that Virginia's planned execution of Breard, although "a tragic consequence of Virginia's failure to abide by the law," may not be enjoined because it would be a mere "*consequence* of the violation and not a continuing wrong." A117-18 (emphasis in original). The District Court's application of the "ongoing violation" requirement is flatly contradicted by a wealth of controlling authority.

In *Milliken v. Bradley*, the Supreme Court held that the Eleventh Amendment did not preclude a school desegregation order that directed Michigan state officials to prospectively eradicate the *effects* of segregation by paying half the funds necessary to implement a remedial education plan for the Detroit school system. 433 U.S. at 288-90. The Court concluded that the remedial education program was "plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit." *Id.* at 290. That the education plan would be implemented after *de jure* segregation had been eliminated did not alter the Court's conclusion. *Id.*; *see also*

Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 713 (4th Cir. 1996) (sovereign immunity does not bar federal courts from compelling a state to provide funds to eliminate all vestiges of a previously segregated school system); *Parents for Quality Educ. with Integration, Inc. v. Indiana*, 977 F.2d 1207, 1210-11 (7th Cir. 1992) (state's failure to take "affirmative steps to discharge its duty to dismantle the dual school system that its laws helped to create and maintain . . . constitutes a continuing violation of the Fourteenth Amendment").

Similarly, in *Papasan*, the Supreme Court upheld an equal protection suit brought by students in a Mississippi school district that, the students claimed, was underfunded relative to the rest of the state because, 100 years earlier, the state had sold lands held in trust for the district's public schools. Although the Court expressly acknowledged that the dispute arose from the same past actions that gave rise to a claim for money damages barred by the Eleventh Amendment, it held the plaintiffs nonetheless to be entitled to relief from the current consequences of those past events. The Court held that, given its focus on the present consequences, the plaintiffs' equal protection claim alleged "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Papasan*, 478 U.S. at 282; *see also McConnell v. Adams*, 829 F.2d 1319, 1329-30 (4th Cir. 1987) (reversing money damage award against state officials for unconstitutional refusal to rehire plaintiffs as barred by Eleventh Amendment, but affirming injunction reinstating plaintiffs as authorized under *Young*), *cert. denied*, 486 U.S. 1006 (1988).

This Court applied the same analysis in *Coakley*. Mr. Coakley worked for the South Carolina Port Authority

("SPA") and was fired in violation of the Due Process Clause of the Fourteenth Amendment. He sought prospective injunctive relief in the form of reinstatement. This Court rejected the SPA's argument that reinstatement would violate its sovereign immunity because Coakley had failed to allege an "ongoing violation" of his federal rights:

> We recognize that from one point of view, all Coakley has alleged is that for a period in the past the SPA put him through a process that deprived him of due process rights, but that the process, and any relationship between him and SPA, has ended. This would suggest that his suit against Welch is barred for want of an "ongoing" violation. The view we find more consistent with *Papasan* and *McConnell* is that by his allegations and his prayer for an injunction, Coakley has alleged SPA conduct that, while no longer giving him daily attention, continues to harm him by preventing him from obtaining the benefits of SPA employment.

Coakley, 877 F.2d at 307 n.2; *accord McConnell*, 829 F.2d at 1329-30.[2]

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2. Every circuit court that has addressed this question in the reinstatement context has reached the same conclusion. *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir.) ("We do not agree . . . that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially (continued...)

Finally, in *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990), this Court upheld an order directing state officials to provide a class of mentally retarded adults with treatment to eliminate the continuing effects of prior mistreatment the class had suffered while in the state's care. The Court was unwilling to accept the officials' argument that class members who were no longer in state custody failed to allege an ongoing violation of federal law: instead, it held that, consistent with the Eleventh Amendment, relief had properly been awarded for class members who were "presently suffering from unconstitutional conditions imposed while in the hospital." *Id.* at 255. The treatment awarded was designed only to address the continuing effects of past unconstitutional conditions and therefore was prospective relief

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2.(...continued)
undermined because the need for prospective relief often arises out of a past injury"), *cert. denied*, 498 U.S. 813 (1990); *Melo v. Hafer*, 912 F.2d 628, 635-36 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991); *Hall v. Medical College of Ohio*, 742 F.2d 299, 310 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) ("Elliott's alleged wrongful discharge is a continuing violation; as long as the state official keeps him out of his allegedly tenured position the official acts in what is claimed to be derogation of Elliott's constitutional rights"); *Barnes v. Bosley*, 828 F.2d 1253, 1257-58 (8th Cir. 1987); *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 589 (10th Cir. 1994); *Cross v. Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995).

that "fully comport[ed] with the remedy approved in *Milliken v. Bradley*." *Id.*; *see also Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir.) (a "federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of past constitutional violations"), *cert. denied*, 479 U.S. 962 (1986).

Like the plaintiffs in the desegregation, reinstatement and mental health cases, Paraguay currently suffers from the "tragic consequence[s] of [state officials'] abiding failure to abide by the law." A117. Where, as here, the relief requested cannot be construed as a demand for money damages, the doctrine of *Ex parte Young* authorizes federal courts to grant relief. The District Court's ruling would eviscerate a doctrine that has proved "indispensable to the establishment of constitutional government and the rule of law." CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 312 (5th ed. 1994). Its decision should be reversed.

B. Paraguay Seeks An Injunction Against An Ongoing Violation Of Its Rights Under Two Treaties.

A second ground for reversal of the District Court's Eleventh Amendment holding is its error in construing the rights accorded and obligations imposed by the Treaties so narrowly as to find no ongoing violation. The District Court's Eleventh Amendment analysis was based on the erroneous premise that defendants' obligations under the Treaties were fully satisfied by permitting Paraguay to provide consular assistance to Breard at a time when it was useless and meaningless: *after* Breard had been arrested, arraigned, tried

and sentenced to death, had exhausted all appeals and state habeas proceedings and was scheduled for execution. *See* A117 ("Now that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties"). Contrary to the District Court's restrictive reading, the Treaties guarantee the right to provide *meaningful* consular assistance to a state's detained nationals. Because the defendants continue to deny Paraguay the opportunity to provide assistance to Breard at a time and in a context where their assistance could meaningfully affect the outcome or conduct of the case against him, their violation of Paraguay's rights is an ongoing and continuing one—even giving "ongoing violation" the restrictive meaning the District Court accorded it.

"[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it.'" *United States v. Stuart*, 489 U.S. 353, 368 (1988) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)); *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). "[E]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Stuart*, 489 U.S. at 368 (internal quotation omitted). This general rule of liberal construction is supplemented by the Vienna Convention's specific directive that domestic law be applied so as to "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention, art. 36(2).

The signatories to the Treaties at issue here required *prompt* notification of a national's detention to ensure that their respective consular officers could provide meaningful

assistance to the national's defense, at trial and before. The Vienna Convention requires the authorities of the arresting state "without delay" to inform the detained national of his right to consular assistance, and also requires them, upon the national's request, "without delay [to] inform the consular post . . . if . . . a national of that state is arrested . . . or detained in any other manner." Vienna Convention, art. 36(1)(b). By virtue of its most-favored-nation clause, the Friendship Treaty likewise requires that a consular officer shall "immediately" be notified of a national's arrest and provided access to the national no more than four days after the arrest. *E.g.*, Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2)-(3) & §§ 1-2 of protocol, 19 U.S.T. 5018, 5027, 5039 (providing privileges of immediate notification and access to Soviet consuls); *see* Friendship Treaty, art. XII (Paraguayan consuls entitled to privileges of most favored nation); *see also Santovincenzo v. Egan*, 284 U.S. 30, 35-36 (1931) (under most-favored-nation clause such as that in Friendship Treaty, rights and privileges provided other consuls under other treaties inure to benefit of consul invoking clause).

Reference to nation-state practice is unnecessary given the clear language of the Treaties here. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 535 (1991) (where there are "difficult or ambiguous passages" in a treaty, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (internal quotation omitted). Nonetheless, state practice underscores that the District Court's crabbed reading of the rights accorded by the Treaties was in error. As United States Department of State has stressed:

> Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly. . . . Serious problems in this regard [concerning provision of consular notification "without delay"] have been experienced by American consular officers in countries of Eastern Europe, where . . . detention of an individual for prolonged "interrogation" prior to the filing of formal charges is officially sanctioned. During this period of days, weeks, or even months, authorities of the receiving state may decline to observe that State's obligation to make notification to consular officials of the sending State. *Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.*

ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973) (emphasis supplied); *see Commentary on Draft Articles on Consular Relations Adopted by the International Law Commission at Its 13th Session*, U.N. GAOR, Conf. on Consular Relations, annex, art. 36, UN Doc. A/CONF. 25/6, *reprinted in* 2 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS 24 (1963) (article 36 intended, among other things, to enable consular assistance "where a national of the sending State has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgment is still open to appeal or cassation; and also cases

where the judgment convicting the national has become final.") (*hereinafter* OFF. REC.).[3]

The clear intent of the Treaties' provisions for prompt notification and access is to provide consular officers the opportunity to assist the national at a time and in a context where such assistance can be most useful to the national and most effective in the exercise of consular functions. By holding that the provision of consular access *three years* after Breard's trial and conviction satisfied the Treaties' requirement of prompt notification and access, the District Court departed from the unambiguous text and intent of the Treaties. In the most fundamental sense, so long as defendants continue to detain Breard and to take steps to carry out a death sentence rendered without permitting the notification and access to which Paraguay is entitled, defendants continue to violate Paraguay's rights under the Treaties.

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3. Article 36(2)'s requirement that local law give "full effect" to the article's purposes was adopted over an amendment proposed by the Soviet Union which would have permitted domestic law to impair the rights accorded in Article 36 so long as they did not render them completely inoperative. U.N. GAOR, Conf. on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶ 2-9, UN Doc. A/CONF. 25/SR. 12, 17 April 1963, p. 1, *reprinted in* 1 OFF. REC. 40; *see id.* (statement by Mr. Khlestov, USSR) (stating that article 36(2) could "force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders").

II.

THE DISTRICT COURT HAD JURISDICTION OVER PARAGUAY'S ACTION TO VINDICATE ITS TREATY RIGHTS BECAUSE PARAGUAY WAS NOT A PARTY TO THE STATE COURT ACTION AND HAD NO APPEAL TO THE SUPREME COURT.

The District Court also erred in holding that Paraguay's action effectively sought review of a state court judgment which could be reviewed only by habeas corpus petition or by the Supreme Court. A118 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Paraguay was not a party to the state court proceedings, its claims were not presented to that court, no appeal by Paraguay from the state proceedings could be had, Paraguay has no habeas remedy and it seeks no review in this action of any ruling by the state court. Under established principles of federal law, the District Court has original jurisdiction over this action and the *Rooker/Feldman* doctrine does not operate as a bar.

A. The District Court Has Jurisdiction Over Paraguay's Action To Enforce Treaty Rights Violated By State Officials.

The federal district courts have jurisdiction of actions arising under treaties of the United States. 28 U.S.C. § 1331 ("district courts shall have original jurisdiction of all civil actions arising under the . . . treaties of the United States"). As part of the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2, the interpretation of treaties has long been held to be

"the peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 32 (1899).

"[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do." *Pfizer, Inc. v. India*, 434 U.S. 308, 318-19 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12 (1964) (unless foreign state is at war with or not recognized by United States, courts of this country are open to it); *see also* 28 U.S.C. § 1332(a)(4) (providing jurisdiction over actions brought by a foreign state "as plaintiff" in the district courts).

And "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In appropriate circumstances, such as those here, a district court may enjoin any further action to enforce a state court judgment rendered in violation of federal law. *See, e.g., French v. Hay*, 89 U.S. (22 Wall.) 250, 252-53 (1874); *United States v. Owens*, 54 F.3d 271, 276-77 (6th Cir.), *cert. dismissed*, 116 S. Ct. 492 (1995); *Munoz v. County of Imperial*, 667 F.2d 811, 814, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982).

B. The *Rooker/Feldman* Doctrine Does Not Bar Paraguay's Claims.

In holding that the *Rooker/Feldman* doctrine applied "regardless of the procedural posture of the litigants," A118, the District Court failed to apply the dispositive decisions of

the Supreme Court and every circuit to consider the question. Under the *Rooker/Feldman* doctrine, "*a party losing in state court* is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court." *Johnson v. De Grandy*, 114 S. Ct. 2647, 2654 (1994) (emphasis supplied). The basis for the doctrine is that Congress intended the Supreme Court to have exclusive appellate jurisdiction over state court decisions on federal law pursuant to 28 U.S.C. § 1257. *Feldman*, 460 U.S. at 476; *Rooker*, 263 U.S. at 416 (citing predecessor statute); *see also Leonard v. Suthard*, 927 F.2d 168, 169 (4th Cir. 1991).

Rooker/Feldman expresses a jurisdictional constraint that imposes order on the flow of federal question cases in the federal courts system: if a party litigates a federal question in the state courts and loses, that party may seek review of that federal question only in the Supreme Court and may not attempt to evade the requirements of section 1257 by invoking the district courts' original jurisdiction over that same question under section 1331. *Feldman*, 460 U.S. at 476; *Rooker*, 263 U.S. at 416; *see also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4469 (1981) (doctrine mandates, in essence, "that federal courts must honor the res judicata effects of state court judgments").

Contrary to the District Court's ruling, just three years ago the Supreme Court affirmed that, where the federal plaintiff was not a party in state court and had no opportunity to appeal the state court judgment to the Supreme Court, the plaintiff's claims are not barred by *Rooker/Feldman*. *Johnson*

v. De Grandy, 114 S. Ct. at 2654.[4] In *De Grandy*, the Florida Supreme Court had upheld the constitutionality of an electoral redistricting enacted by the Florida legislature. 114 S. Ct. at 2652. The United States thereafter brought suit in federal district court under section 2 of the Voting Rights Act, alleging that the redistricting diluted minority voting strength. *Id.* The Supreme Court rejected Florida's argument that *Rooker/Feldman* was a bar because the United States was effectively seeking review of the Florida Supreme Court's decision in district court: "unlike Rooker or Feldman, the United States was not a party in the state court." *Id.* at 2654. Because the United States "was in no position to ask th[e Supreme] Court to review the state court's judgment" and was

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4. Every circuit to consider the question has likewise held, consistent with *De Grandy*, that *Rooker/Feldman* is no bar to a federal plaintiff who was not a party to the state court proceedings and therefore had no right of appeal to the Supreme Court. *Schneider v. Colegio de Abogados*, 917 F.2d 620, 629 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840-41 & n.4 (3d Cir. 1996); *E.B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1148-49 (5th Cir.), *cert. dismissed*, 400 U.S. 805 (1970); *United States v. Owens*, 54 F.3d at 274; *Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589, 597-98 (7th Cir. 1992), *cert. denied*, 508 U.S. 941 (1993); *McCurry v. Tesch*, 738 F.2d 271, 274 & n.3 (8th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir.), *certifying questions to* 676 So. 2d 1206 (Ala.), *on receipt of answers to certified questions*, 52 F.3d 300 (11th Cir.), *cert. denied*, 116 S. Ct. 276 (1995).

"merely seek[ing] to litigate its § 2 case for the first time," *Rooker/Feldman* did not bar it from proceeding in the federal courts. *Id.*

Like the United States in *De Grandy*, Paraguay was not a party to the state court proceedings. It seeks for the first time an injunction in federal court against Virginia's continuing interference with its federally-protected consular functions. The *Rooker/Feldman* doctrine does not bar its claims.[5]

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5. The District Court also cited in its *Rooker/Feldman* discussion the decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which defendants had urged as an independent ground for dismissal. It is unclear whether the District Court viewed *Preiser* as additional support for its ruling that *Rooker/Feldman* bars Paraguay's claims, as it appeared to cite *Preiser* only for the undisputed proposition that *Rooker/Feldman* does not bar federal habeas review of state court decisions. *See* A118. In any event, *Preiser* provides no such support.

The issue in *Preiser* was whether, where both 42 U.S.C. § 1983 and 28 U.S.C. § 2254 provided a remedy, a state prisoner could elect to proceed under the more general provisions of section 1983. 411 U.S. at 482-90. While acknowledging that section 1983's broad language literally encompassed the prisoners' claims, the Court held that "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a

(continued...)

Under no rationale can the state court judgment preclude Paraguay's claim here. The essence of Paraguay's claim is that it was deprived of its federally protected right to assist its citizen because it was never informed of the existence of the proceedings against him. By suggesting that the very proceeding from which Paraguay was unlawfully excluded could preclude Paraguay from asserting its right to assist in such proceedings, the District Court engaged in circular reasoning that finds no support in the authority on which it relied. The state court judgment is the event which gives rise to Paraguay's claim. It cannot at the same time pose a bar to that claim.

5.(...continued)
situation like this where it so clearly applies." 411 U.S. at 489.

Here, on its own terms, *Preiser* does not apply. The defendants never contended that Paraguay had a remedy under the federal habeas statute. Unlike the Court in *Preiser*, the District Court here was not called upon to decide between a general statute and a specific statute, either of which could provide complete relief on the facts pleaded. *See Preiser*, 411 U.S. at 488.

CONCLUSION

The District Court's order should be reversed and this action should be remanded for further proceedings.

Dated: March 4, 1997

DEBEVOISE & PLIMPTON
By: *Donald Francis Donovan*
Donald Francis Donovan
Barton Legum
Michael M. Ostrove
Alexander A. Yanos
875 Third Avenue
New York, New York 10022
(212) 909-6000

Loren Kieve
DEBEVOISE & PLIMPTON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-8000

Associate Professor Leslie M. Kelleher
T.C. Williams School of Law
University of Richmond
Richmond, Virginia 23173
(804) 289-8359

Professor Rodney A. Smolla
Professor Linda A. Malone
Marshall-Wythe School of Law
College of William and Mary
South Henry Street
P.O. Box 8795
Williamsburg, Virginia 23187
(804) 221-3800

Attorneys for Plaintiffs-Appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos

ADDENDUM REPRODUCING FEDERAL AUTHORITY

TREATIES

1.

Vienna Convention on Consular Relations,
Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

* * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular

post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

2.

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091

* * *

Article XII

* * *

The diplomatic agents and consuls of the United States of America in the territories of the Republic of Paraguay shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to the diplomatic agents and consuls of any other nation whatever; and, in like manner, the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever.

3.

Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426

* * *

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when

any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

4.

Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018

* * *

Article 12

* * *

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state,

subject to the proviso, however, that the said laws and regulations must not nullify these rights.

* * *

PROTOCOL

To the Consular Convention Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

5.

**Agreement on Consular Relations, Jan. 31, 1979, U.S.-China,
30 U.S.T. 17**

* * *

5. If a citizen of the sending country is arrested or detained in any manner, the authorities of the receiving country shall, without delay, notify the consular post or embassy accordingly of the arrest or detention of the person and permit access by a consular officer of the sending state to the citizen who is under arrest or detained in custody.

STATUTES

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (WESTLAW through all 1996 legislation).

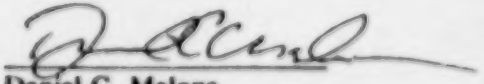
CERTIFICATE OF SERVICE

I, Daniel C. Malone, a law clerk with Debevoise & Plimpton, attorneys for plaintiffs-appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos, hereby certify under penalty of perjury that I have, this 4th day of March, 1997, caused eight copies of the foregoing Plaintiffs'-Appellants' Brief, together with six copies of the Joint Appendix, to be filed by first class mail with the Clerk of Court and caused two copies of said brief and one copy of said appendix to be served by first class mail on each of the following:

Donald R. Curry, Esq.
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Ara L. Tramblian, Esq.
Deputy County Attorney
Office of the County Attorney
#1 Courthouse Plaza, Suite 403
2100 Claredon Boulevard
Arlington, Virginia 22201

Dated: March 4, 1997



Daniel C. Malone

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

REPUBLIC OF PARAGUAY, et al.,

Appellants

v.

GEORGE ALLEN, GOVERNOR OF VIRGINIA, et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia Richmond Division

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JAMES S. GILMORE, III
Attorney General of Virginia

DONALD R. CURRY
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

ARA L. TRAMBLIAN
Deputy County Attorney
Office of the County Attorney
#1 Courthouse Plaza, Suite 403
2100 Clarendon Boulevard
Arlington, Virginia 22201
(703) 358-3100

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* * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular

post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

2.

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091

* * *

Article XII

* * *

The diplomatic agents and consuls of the United States of America in the territories of the Republic of Paraguay shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to the diplomatic agents and consuls of any other nation whatever; and, in like manner, the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever.

3.

Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426

* * *

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when

any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

4.

Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018

* * *

Article 12

* * *

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state,

subject to the proviso, however, that the said laws and regulations must not nullify these rights.

* * *

PROTOCOL

To the Consular Convention Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

5.

Agreement on Consular Relations, Jan. 31, 1979, U.S.-China,
30 U.S.T. 17

* * *

5. If a citizen of the sending country is arrested or detained in any manner, the authorities of the receiving country shall, without delay, notify the consular post or embassy accordingly of the arrest or detention of the person and permit access by a consular officer of the sending state to the citizen who is under arrest or detained in custody.

STATUTES

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was

violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (WESTLAW through all 1996 legislation).

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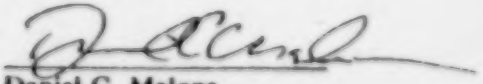

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APPELLEES' BRIEF

ISSUE PRESENTED

Did the district court correctly rule that, outside the limited parameters of a proceeding under 28 U.S.C. § 2254, the lower federal courts have no jurisdiction to review the validity of a state prisoner's conviction or sentence, or to declare that a state court criminal judgment is unenforceable?

STATEMENT OF THE CASE

This is a case in which the Republic of Paraguay and two of its officials attempted to come to the aid of an admitted capital murderer, Virginia death row prisoner Angel Francisco Breard. In August of 1996, Breard filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia. One of Breard's many claims, but one upon which he placed primary emphasis, was an allegation that both his capital murder conviction and death sentence were unconstitutional because, at the time of his arrest, the Virginia authorities failed to advise him that, pursuant to the Vienna Convention on Consular Relations ("Vienna Convention"), he had the right to contact the Paraguayan consulate. Because Bread never had raised his claim in state court, however, it was obvious from the outset of his federal habeas proceedings that, at the very least, he faced severe procedural obstacles to obtaining collateral relief upon such a claim.

It was at this point that the plaintiffs attempted to come to Breard's rescue. On September 12, 1996, they filed the instant action under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 in the same federal district court where Breard's habeas petition was pending. Paraguay and its two officials asked the district court to declare that all the named defendants--from Governor Allen to the Chief of Police in Arlington County--had violated, not only the Vienna Convention, but also the Friendship, Commerce and Navigation ("FCN") Treaty of 1859. This would have been remarkable, by itself, but the plaintiffs did not stop there. From the outset of the litigation, up to and including the oral argument that the district court heard on November 26, 1996, they consistently made clear ***that the only possible remedy for the alleged violations was for the***

court to declare Breard's capital murder conviction and death sentence void and to enjoin the defendants from taking any steps to carry out the conviction or sentence.

On November 27, 1996, the district court determined that it did not have jurisdiction to grant the relief requested by the plaintiffs. Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996). (App. 116-118, 123). On that same date, the district court also dismissed Breard's habeas petition, after specifically finding that his "Vienna Convention" claim was barred from federal collateral review by his failure to raise it in state court. Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996).

The plaintiffs filed their notice of appeal in the district court on December 5, 1996. (App. 5).

STATEMENT OF FACTS

The Virginia Supreme Court found the facts surrounding Breard's capital offense to be as follows:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.
>
> About 10:00 or 10:15 p.m. on February 17, 1992, Dickie left an Arlington restaurant. About 10:30 or 10:45 p.m., Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. Isch heard Dickie say, "[K]eep your hands off me." According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, when everything became quiet, Isch called the apartment complex maintenance man.
>
> Upon receiving Isch's call, the maintenance man, Joseph King, went to Dickie's apartment. King knocked on the apartment door and heard "something that sounded like something being drug

across the floor." After receiving no response to his knocking, King called the police.

When the police arrived, King gave them a master key. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread wide. She was bleeding profusely and did not appear to be breathing.

The police observed a "shiny...dried...body fluid" on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. The police found Dickie's eyeglasses, without one lens, in the living room, and the missing lens was found under her body. A telephone receiver located near her head was covered with blood. In the room where Dickie's body was found, the police also found her shoes and her pants with some buttons missing. Dickie's purse was on the floor just inside the front door, and her set of keys was on the floor between her legs.

An autopsy revealed that Dickie had sustained five stab wounds to the neck. Two of the wounds would have caused her death.

The body fluid found on Dickie's pubic hair and inner thigh was subjected to a serological examination and identified as semen. No semen was detected on vaginal or anal swabs.

In the course of their investigation, the police obtained a sample of Breard's blood and samples of his head and pubic hair. The hair samples were subjected to microscopic examination, and the blood sample was subjected to enzyme testing and DNA analysis.

The foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to the hair samples taken from Breard. The hairs found clutched in Dickie's hand were Caucasian hairs "microscopically like" Dickie's own head hair and bore evidence that they had been pulled from her head by the roots.

The semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects. On all five of the genetic probes used in the DNA testing, Breard's DNA profile matched the DNA profile of the semen found on Dickie's body.

> Breard is a native of Argentina, and his DNA profile occurs in only one in seventeen million members of the Hispanic population. Only 1.7% of the general population has Breard's enzyme typing.
>
> At trial, Breard testified in his own defense. He stated that, on the night of February 17, 1992, he left his apartment armed with a knife because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex with [him]." Breard admitted that he engaged Dickie in conversation on the street, followed her to her apartment, argued with her, and forced himself into her apartment. Breard also admitted that he stabbed Dickie, removed her pants, and got "on top of her." While he was on Dickie, he heard someone knocking on the door. He "got scared," opened a kitchen window, jumped to the ground, and fled. Breard also testified that, at the time, he believed that he was under a curse placed upon him by his ex-wife's father.

Breard v. Commonwealth, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-674 (1994).

Breard was arrested in Arlington on August 17, 1992. There is no evidence that he was advised by the arresting authorities that he could contact the consulate of a foreign country; nor is there any evidence that he sought to make such contact but was denied. It is undisputed, however, that the state court promptly appointed two attorneys to represent Breard and that those attorneys were free to contact whomever they saw fit.

On June 24, 1993, after a 3½ day trial, a jury in the Circuit Court of Arlington County convicted Breard of capital murder and attempted rape. The jury fixed Breard's punishment for the attempted rape at 10 years imprisonment and a fine of $100,000.

The trial court conducted a separate sentencing proceeding on June 24-25, 1993. After considering all the evidence in aggravation and mitigation, the jury sentenced Breard to death for the capital offense, finding that he represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4.

The trial judge conducted yet another sentencing proceeding on September 9, 1993, at which the court considered additional evidence introduced on Breard's behalf. At the conclusion of that hearing, however, the court imposed final judgment in accordance with the jury's verdicts. At no time in the trial court did Breard raise claims regarding alleged treaty violations or the authorities' alleged failure to advise him at the time of his arrest that he could contact a foreign consulate.

Breard's convictions and sentences were affirmed by the Supreme Court of Virginia on June 10, 1994. Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994). With respect to the evidence warranting the death penalty, the Court found as follows:

> In the penalty phase of the trial, the Commonwealth presented evidence that Breard had attacked two other women. Approximately three weeks before Breard murdered Dickie, he attacked Celia Gonzales on a street in Arlington County. He grabbed Gonzales from behind, ordered her to accompany him, and told her that he had a gun. Breard ultimately released Gonzales after he had been observed by a man sitting in a nearby parked car. Before leaving, Breard told Gonzales that he knew where she lived and that he "[had] someone who's going to get [her] later."
>
> On August 17, 1992, six months after Dickie's murder, Breard attempted to sexually assault Jeanine Yvonna Price. Breard and Price had met in Washington, D.C., and the two traveled, in Breard's automobile, to Breard's Arlington apartment.
>
> At the apartment, Breard began kissing Price "all over." Price resisted, but Breard pulled her to the floor, sat on her stomach, and started to remove her clothing. Eventually, he removed all of her clothing and started to remove his pants.
>
> Price began screaming for help, and Breard responded by hitting her in the face and ordering her to be quiet. Breard attempted to tie Price's hands with a telephone cord and told her that he intended to have anal intercourse with her.

> A man in a nearby apartment heard Price's screams and called the police. When the police arrived, they found Price, naked and hysterical, and Breard clad only in his undershorts. Breard was arrested and, at that time, became a suspect in Dickie's murder.

Breard, 248 Va. at 85, 445 S.E.2d at 680. In his appeal to the Virginia Supreme Court, Breard did not claim that any treaties had been violated in his case.

After his appeal to the Virginia Supreme Court, Breard petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court, however, denied the certiorari petition on October 31, 1994. Breard v. Virginia, 115 S.Ct. 442 (1994).

On October 24, 1994, the Circuit Court of Arlington County appointed new counsel to represent Breard in his state habeas corpus proceedings. Breard filed his state petition on May 1, 1995. The petition raised no claim regarding any alleged treaty violations. The Circuit Court dismissed the petition on June 29, 1995. Breard subsequently filed a motion to reconsider which the state court denied on July 24, 1995.

Breard then filed a petition for appeal in the Virginia Supreme Court on September 28, 1995. On October 11, 1995, however, the Virginia Supreme Court granted Breard's request to file an amended petition for appeal, which Breard filed October 30, 1995. Once again, Breard raised no claim that any treaties had been violated in his case. The Virginia Supreme Court refused the amended petition for appeal on January 17, 1996. Breard's petition for rehearing was denied on March 1, 1996.

On April 29, 1996, the district court granted Breard's request for a stay of execution and on May 2, 1996, appointed counsel to represent Breard in his federal habeas proceedings. Breard subsequently filed a 71-page habeas petition on August 30, 1996. In that petition, Breard for the first time claimed that his conviction and sentence should be overturned because of an

alleged violation of the Vienna Convention. After hearing oral argument on the respondent-Warden's motion to dismiss, the district court dismissed Breard's petition on November 27, 1996. Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996). As previously noted, the court specifically found that Breard's "Vienna Convention" claim was procedurally defaulted by his failure to raise it in state court. Id. at 1263.

Breard's appeal from the district court's denial of federal habeas relief is pending in this Court. See Breard v. Netherland, No. 96-25.

SUMMARY OF THE ARGUMENT

The plaintiffs have maintained consistently throughout this litigation that the *only* relief that can remedy the wrong they allegedly have suffered is for the federal courts to invalidate and declare unenforceable Angel Breard's capital murder conviction and death sentence. The law is quite clear, however, that neither the district court nor this Court may grant such relief, except in the context of Breard's pending habeas corpus proceedings under 28 U.S.C. § 2254. The Eleventh Amendment of the Constitution and the Supreme Court's "Feldman" doctrine prohibit a lower federal court from *directly* reviewing or invalidating the judgment of a state court. State court criminal judgments may be reviewed by a lower federal court *collaterally*, but only within the limited parameters of a § 2254 proceeding.

Breard's treaty-based habeas claim undoubtedly is procedurally barred by his failure to have raised the claim in state court, and the district court so found in Breard's § 2254 proceeding. The plaintiffs cannot be permitted to obtain for Breard through the back door of the federal courthouse the very same relief that Breard is prohibited from obtaining through the front door.

When one party to a treaty has a complaint against another party, moreover, the controversy falls squarely within the "political question" doctrine. Such inherently political issues are not justiciable by the federal courts.

This Court, therefore, should affirm the district court's dismissal of the plaintiffs' suit. Ten of the eleven named defendants' sole connection to the case is their sworn duty as Virginia public officials to carry out Breard's conviction and sentence unless or until a court of competent jurisdiction overturns those judgments. That, however, is a judicial remedy unavailable in this proceeding. On the other hand, the one remaining defendant, the currently Acting Police Chief of Arlington County, is a local official who has no role or authority in carrying out Breard's conviction or sentence and, therefore, has no connection whatever to the remedy which the plaintiffs have specified is indispensable to its suit.

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFFS.[1]

A. The Eleventh Amendment

The Eleventh Amendment of the United States Constitution is remarkably short and unequivocal: "The judicial power of the United States shall not be construed to extend to any

[1] In the district court, the plaintiffs premised the subject matter jurisdiction of their suit solely upon 28 U.S.C. § 1331. (App. 8). On appeal, they rely not only upon § 1331, but § 1332(a)(4) as well. (Pl. Br. 1). Because § 1332(a)(4) was not asserted in the district court, it cannot be asserted for the first time on appeal. See generally Spencer v. Murray, 5 F.3d 758, 762 (4th Cir. 1993), cert. denied, 510 U.S. 1171 (1994); McGowan v. Gillenwater, 429 F.2d 586, 587 (4th Cir. 1970) (per curiam). In any event, § 1332(a)(4) clearly does not apply here because the plaintiffs' suit does not -- and could not -- request money damages (see below at 18 n.5) and the jurisdictional statute requires that "the matter in controversy exceeds the sum or value of $50,000."

suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Supreme Court consistently has held "that the Eleventh Amendment bar[s] a suit brought against a State by a foreign state." Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1129 (1996), citing Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

It is, therefore, beyond question that, if the plaintiffs had named the Commonwealth of Virginia as the defendant in their suit, the Eleventh Amendment would have interposed an absolute bar. The plaintiffs contend, however, that it successfully has circumvented that bar by naming various Virginia officials as the defendants, and that Ex parte Young, 209 U.S. 128 (1908), authorizes the suit because they merely are seeking "prospective" relief for what they consider to be Virginia's "continuing violation" of the treaties. (Pl. Br. 2, 10-20). The district court correctly rejected this argument for several reasons:

1. Ex Parte Young

As the Supreme Court recently noted in Seminole Tribe, since Ex parte Young was decided, the Court often has "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 116 S.Ct. at 1132, quoting Green v. Mansour, 474 U.S. 64, 68 (1985). Under Ex parte Young, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials ***to conform their future conduct to the requirements of federal law***." Quern v. Jordan, 440 U.S. 332, 337 (1979) (emphasis added). By definition, then, Ex parte Young does not apply "to claims for retrospective relief." Green, 474 U.S. at 68.

That aspect of the plaintiffs' suit that asked the district court in 1996 to invalidate

Breard's 1993 state court conviction and sentence (App. 25) clearly was a request for retrospective, rather than prospective, relief and, therefore, did not fall within the ambit of Ex parte Young. That the suit was retrospective, at least in part, also is demonstrated by one of the plaintiffs' request for a "reinstating [of] the status quo as of the time [the] plaintiffs rights were violated." (App. 7).

Seminole Tribe, moreover, makes clear that, even if the relief sought is deemed to be "prospective," the broader remedies under Ex parte Young are unavailable if Congress has created a limited remedial scheme by statute. Seminole Tribe, 116 S.Ct. at 1132-1133. As will be demonstrated below, Congress has made it abundantly clear that the "limited remedial scheme" embodied in § 2254 proceedings is the ***exclusive*** federal forum for litigating the validity of a state prisoner's conviction or sentence. (See below at 17-19).

Ex parte Young also is inapplicable in a case such as this where the State is the "real, substantial party in interest." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984). It would be difficult to imagine a case in which the State is more the "real, substantial party in interest" than a federal civil suit where the indispensable relief sought by the plaintiffs is the overturning of the State's presumptively valid criminal judgment against a death row prisoner. Indeed, all but one of the named defendants have no connection to the plaintiffs' suit other than their sworn duty as Virginia public officials to carry out the State's judgment unless or until that judgment is overturned by a court of competent jurisdiction. On the other hand, the one other named defendant, the currently Acting Police Chief of Arlington County, is a local official who has no connection to the relief sought by the plaintiffs. While Ex parte Young and Congress' specific authorization of § 2254 proceedings allow federal courts to